No. 95-2074

FILED
JAN 8 1997
CLERK

IN THE

Supreme Court of the United States

October Term, 1996

CITY OF BOERNE, TEXAS,
Petitioner,
-vs-
P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent,
and
UNITED STATES OF AMERICA,
Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMICUS CURIAE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (1994), comports with the Establishment Clause of the First Amendment.

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INTEREST OF AMICUS

The American Center for Law and Justice (ACLJ) is a not-for-profit public interest law firm and education organization. The ACLJ is committed to educating the public regarding individuals' First Amendment rights and related statutory rights, and to protecting those same rights, particularly, the freedoms of speech, religion and assembly. In furtherance of these goals, the ACLJ publishes informational materials for public dissemination. The ACLJ also furnishes, in appropriate circumstances, free legal services for the protection of those First Amendment rights.

Counsel of record for amicus ACLJ has argued seven times before this Court, including in the cases of *Board of Education v. Mergens*, 496 U.S. 226 (1990), and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). In *Mergens* and *Lamb's Chapel*, this Court rejected Establishment Clause objections to federal statutory and constitutional accommodations of the activities of private persons undertaken for religious purposes.

The ACLJ litigates numerous cases on behalf of clients who put their religious beliefs into practice — i.e., engage in the exercise of religion. The Religious Freedom Restoration Act (RFRA) provides an important statutory cause of action or, where needed, affirmative defense for such clients.

RFRA fits comfortably into the tradition of government accommodation of religious practices. The ACLJ submits this amicus brief specifically to rebut the assertion that RFRA somehow violates the Establishment Clause of the First Amendment.

The parties have consented to the filing of the present brief.

SUMMARY OF ARGUMENT

Petitioner charges that because the Religious Freedom Restoration Act (RFRA) expands religious liberty beyond the minimum scope of the Free Exercise Clause of the First Amendment (as construed by this Court), RFRA violates the Establishment Clause of that amendment. But under the Fourteenth Amendment incorporation doctrine, the same Establishment Clause limits state governments as well as the federal government. Hence, an attack on RFRA under the Establishment Clause is equally an attack on every state constitutional or statutory provision providing greater protection for religious freedom than is found in the federal guarantee. Petitioner completely overlooks this major consequence of its argument.

Fortunately, petitioner is mistaken in its claim that RFRA violates the Establishment Clause. This Court's unanimous decision in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), together with predecessor cases, confirm that the federal and state governments may permissibly accommodate religious liberty beyond the absolute constitutional minimum set by the Free Exercise Clause. RFRA simply accommodates religious freedom in such a wholly constitutional manner.

Application of the *Lemon* test does not alter this conclusion. Accommodating the exercise of religion is a legitimate legislative purpose, lifting substantial obstacles from religious exercise is a permissible primary effect, and the recognition of claims and defenses under RFRA entails no excessive entanglement between church and state.

ARGUMENT

Petitioner attacks the constitutionality of the Religious Freedom Restoration Act (RFRA) on several grounds. This amicus brief responds specifically to the charge that RFRA violates the Establishment Clause of the First Amendment. *See* Pet. Br. at 46-49; *see also* Amicus Br. of Center for the Community Interest at 5-9. As shown below, RFRA fully comports with the Establishment Clause.

I. PETITIONER'S ESTABLISHMENT CLAUSE CHALLENGE TO RFRA EQUALLY STRIKES AT ALL STATE CONSTITUTIONAL OR STATUTORY PROVISIONS THAT PROVIDE GREATER PROTECTION FOR RELIGIOUS LIBERTY THAN *SMITH* DOES.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion ...." U.S. Const. amend. I. This Court has held that the Fourteenth Amendment makes the Establishment Clause applicable to the states. *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947). This extension of the Establishment Clause to the states has profound implications for the analysis of the present case. For if the Establishment Clause forbids Congress from requiring strict scrutiny of religious liberty claims, then likewise, under the incorporation doctrine, the Establishment Clause forbids states from requiring — whether by state constitution or by statute — strict scrutiny for religious liberty claims.

It is settled doctrine that states, as sovereigns containing primary, independent authority to safeguard the life, liberty, and property of persons within their borders, are free to provide state constitutional protections greater than those

secured by federal constitutional provisions. *E.g.*, *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (state constitution may provide greater protection for free speech than First Amendment does). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Linde, *E Pluribus — Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165 (1984).

Consequently, while this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), governs interpretation of the federal constitutional right to religious freedom, a state constitution can still provide stricter protection for religious liberty. For example, a state may prohibit any governmental burdening of religion, even by neutral and generally applicable laws, absent both a compelling government interest and no less restrictive means of furthering that interest. *E.g.*, *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (on remand from this Court in light of *Smith*, state supreme court holds that state constitutional right to religious freedom requires strict scrutiny analysis); *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 840 P.2d 174 (1992) (same); *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994) (state constitution requires compelling interest test); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996) (state constitution requires strict scrutiny). *See* Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 B.Y.U. L. Rev. 275.

Petitioner's Establishment Clause argument threatens this jurisprudence of federalist constitutional diversity. By explicitly attacking RFRA, petitioner implicitly challenges all state constitutional or statutory provisions which, like

RFRA, provide greater protection for religious liberty than *Smith* does.[1]

Petitioner therefore faces a quandry. Petitioner allows on the one hand that "the states voluntarily could protect religious liberty more robustly than the Federal Constitution through their own constitutions or through legislative action." Pet. Br. at 45 (citations omitted). But with the other hand, petitioner argues implicitly that any such expansion of religious liberty would violate the Establishment Clause. Petitioner cannot have it both ways.

Fortunately, the escape from this quandry is clear: petitioner's constitutional premise — that RFRA violates the

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1. Amicus American Center for the Community Interest (CCI) likewise argues, in effect, that state constitutional guarantees of religious liberty inherently offend the Establishment Clause. If Congress "cannot place the religious claims of some over the secular policy judgments of others," CCI Br. at 5 (emphasis in original), and if Congress "may not place claims to act for religious reasons above similar claims to act for secular reasons of moral conscience," *id.*, then, under the incorporation doctrine, neither may the states do so. Yet this is precisely what both state and federal constitutional and statutory religious liberty provisions do (unless they are mere platitudes). *Compare People v. DeJonge*, 442 Mich. 266, 501 N.W.2d 127 (1993) (parents with religious objections to certification of home school teachers need not comply) *with People v. Bennett*, 442 Mich. 316, 501 N.W.2d 106 (1993) (parents with nonreligious objections to certification of home school teachers must comply). In the very nature of things, nonreligious beliefs, while certainly entitled to due respect, do not trigger the same fundamental concerns — reflected in state constitutional provisions — which prompted the Framers of the Constitution to include the Establishment and Free Exercise Clauses as jealous guardians of religious liberty.

Establishment Clause — is simply mistaken.

II. RFRA IS A PERMISSIBLE ACCOMMODATION OF RELIGIOUS LIBERTY.

The scope and meaning of the Establishment Clause has been a source of unending debates both inside and outside this Court. The federal statute at issue here, however — RFRA — is so far removed from the core concerns of the Establishment Clause as to render those debates, for present purposes, strictly academic.

"It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the `establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970). RFRA neither sponsors nor financially supports religion or religious activity, and, if anything, RFRA reduces government involvement in religious activity.

A. Government May Permissibly Accommodate Religious Practice Beyond the Minimum Scope of Free Exercise Clause Requirements.

Petitioner's argument — that the formal, explicit legal protection of religious liberty violates the Establishment Clause — logically would render the Free Exercise Clause itself "unconstitutional" — an absurdity. Petitioner therefore must confine its argument to the contention that because RFRA provides greater protection than the Free Exercise Clause itself (as interpreted in *Smith*), RFRA invades the province of the Establishment Clause. But this Court has repeatedly rejected the argument that the Free Exercise Clause provides a ceiling as well as a floor for the freedom of

religion.

> It is well established ... that the limits of permissible [government] accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.

Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987) (editing marks and citation omitted). Indeed, were the contrary proposition true, it would be unconstitutional to forbid private religious discrimination under Title VII, to recognize religious objections to military conscription, or to give any other statutory protection to religion that exceeded the bare minimum constitutionally required under the Free Exercise Clause.

This Court has never so held.

In *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), this Court upheld a provision exempting religious organizations from Title VII's ban on religious discrimination in employment. "This Court has long recognized that the government may (and sometimes must) accommodate religious practices without violating the Establishment Clause." *Id.* at 334 (internal quotation marks and citation omitted).

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), this Court upheld the exemption of church property from a city property tax. "Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference."

Id. at 676-77 (emphasis added).

In *Zorach v. Clauson*, 343 U.S. 306 (1951), this Court upheld a "released time" program in which government-run schools allowed children, upon parental request, to leave school grounds during a portion of the school day to attend religious instruction or devotional exercise at religious centers. This Court declared that such an accommodation "follows the best of our traditions," *id.* at 314.

The governmental accommodations in *Amos*, *Walz*, and *Zorach*, extended to all religions — "none was favored over others," *Walz*, 397 U.S. at 677. RFRA likewise applies to all "exercise of religion," thereby qualifying as a neutral accommodation measure. This case therefore differs markedly from *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). In *Thornton*, only those religions which observed a Sabbath were accommodated: "the statute arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath." *Id.* at 709 (emphasis added; footnote omitted). *See also id.* at 711 (O'Connor, J., joined by Marshall, J., concurring) ("The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees") (emphasis added). *Cf. Amos*, 483 U.S. at 337 n.15 (distinguishing *Thornton*).

RFRA walks in the same path already trodden in *Amos*, *Walz*, and *Zorach*. In none of these cases were the accommodations of religious practices required under the Free Exercise Clause. But nor did it follow, this Court concluded, that any of these practices were prohibited by the

Establishment Clause.

B. RFRA Satisfies the *Lemon* Test.

Petitioner nevertheless contends that RFRA fails Establishment Clause analysis under the so-called *Lemon* test.[2] But *Lemon* has never been a rigid rule. *E.g.*, *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (*Lemon* test "no more than a helpful signpost") (editing marks and citation omitted). Indeed, a majority of this Court has not relied upon *Lemon* to invalidate a law for the better part of a decade. *See Rosenberger v. Rectors and Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995) (rejecting Establishment Clause claim without applying *Lemon* test); *Capitol Square Review Bd. v. Pinette*, 115 S. Ct. 2440 (1995) (same); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (same); *Board of Educ. v. Grumet*, 114 S. Ct. 2481 (1994) (invalidating government action under Establishment Clause without invoking *Lemon* test); *Lee v. Weisman*, 505 U.S. 577 (1992) (same); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (rejecting Establishment Clause claim with cursory invocation of *Lemon* test); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (rejecting Establishment Clause claim under *Lemon* test); *see also Grumet*, 114 S. Ct. at 2500 (O'Connor, J., concurring) (noting and approving "the slide away from *Lemon*'s unitary approach"); *Lamb's Chapel*, 508 U.S. at 398-99 (Scalia, J., joined by Thomas, J., dissenting) (collecting prior opinions criticizing *Lemon* test). But even assuming the three-part *Lemon* test retains vitality, RFRA passes that test.

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2. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

"Under the *Lemon* standard ... a court may invalidate a statute only if it is motivated wholly by an impermissible purpose, ... if its primary effect is the advancement of religion, ... or if it requires excessive entanglement between church and state, ..." *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (citations omitted). RFRA easily satisfies all three prongs of *Lemon*.

1. Purpose

Regarding the "purpose" prong, plainly Congress can act to remove the "substantial" burdens on the exercise of religion to which RFRA is directed.

> Under the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions. We may assume for the sake of argument that the pre-[enactment status quo] was adequate in the sense that the Free Exercise Clause required no more. Nonetheless, it is a significant burden on a religious organization [which Congress addressed, and] Congress' purpose ... to minimize governmental "interference" ... does not violate the Establishment Clause.

Amos, 483 U.S. at 335-36 (editing marks omitted in part and altered in part). As in *Walz*, the government may look beyond the absolute minimum of the Free Exercise Clause to address "latent dangers" to religious liberty and take remedial action "simply sparing the exercise of religion from the burden" resulting from otherwise constitutional state action. *Walz*, 397 U.S. at 673.

2. Effect

RFRA clearly has a permissible "primary effect" as well. Because the Court laid this argument so thoroughly to rest in *Amos*, that decision merits quoting at some length.

> The second requirement under *Lemon* is that the law in question have a principal or primary effect ... that neither advances nor inhibits religion. 403 U.S. at 612. Undoubtedly, religious organizations are better able now to advance their purposes than they were prior to the [challenged Congressional enactment]. But religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster: for example, the property tax exemption at issue in *Walz v. Texas Comm'n* ... or the loans of school books to school children, including parochial school students, upheld in *Board of Education v. Allen*, 392 U.S. 236 (1968). A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence. As the Court observed in *Walz*, "[F]or the men who wrote the Religion Clauses of the First Amendment the `establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. at 668. *Accord Lemon*, 403 U.S. at 612.

Amos, 483 U.S. at 336-37 (emphasis in original).

Petitioner finds fault with RFRA because RFRA — like, this Court should note, the Free Exercise Clause itself —

"deliberately singles out religious practices, en masse, as a ... favored class of activity." Pet. Br. at 47. Again, this Court disposed of the argument in *Amos*:

> We find unpersuasive ... the fact that [the Act] singles out religious entities for a benefit. Although the Court has given weight to this consideration in its past decisions, ... it has never indicated that statutes that give special consideration to religious groups are per se invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause. ... Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.

Amos, 483 U.S. at 338 (emphasis added).

Petitioner contends that Congress offends the Establishment Clause by affording statutory protection to religion without extending the same protection to "functionally comparable nonreligious forms of belief and practice." Pet. Br. at 47-48. *See also id.* at 49 ("Congress may not favor religion over nonreligion or religion over philosophy"). This argument suffers deep flaws on two fronts. First, the Free Exercise Clause enshrines precisely the special protection for religion which petitioner finds invidious:

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation ... if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must

> be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, ... philosophical and personal rather than religious ... belief does not rise to the demands of the Religion Clauses.

Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (footnote omitted). Second, if the Establishment Clause were to condemn government laws which distinguish between religion and "functionally comparable nonreligious forms of belief and practice," Pet. Br. at 47-48, then this rule would necessarily apply both when government accommodates only religion and when government accommodates only nonreligious philosophies. "State power is no more to be used to handicap religions, than it is to favor them." *Everson*, 330 U.S. at 18. Hence, for example, the entire governmental program of education — which promotes secular belief systems while disregarding "functionally comparable" religious beliefs and practices — would run afoul of the Establishment Clause. While this conclusion doubtless would find many sympathizers, this Court has not yet indicated its willingness to take that step.[3]

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3. Petitioner accuses Congress of impermissibly saying that "the government likes religion." Pet. Br. at 48. But there is a crucial difference between allowing a practice under law and endorsing that practice. *Cf. Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion of O'Connor, J.). *See also McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., joined by Marshall, J., concurring in judgment) ("the interrelationship of the Religion Clauses has permitted government to take religion into account . . . to exempt, when possible, from generally applicable

3. Entanglement

Finally, RFRA creates no excessive entanglement between government and church. The "entanglement" prong of *Lemon* forbids interference with religious organizations by means of extensive monitoring of their functions. *See Bowen v. Kendrick*, 487 U.S. at 615-16 (and cases cited). To the extent RFRA has an impact on such monitoring, that impact will be to reduce such government monitoring whenever the surveillance substantially and unjustifiably burdens religious exercise. As for the adjudication of claims and defenses under RFRA, this requires no more entanglement than would a claim of inadequate accommodation of religious beliefs under Title VII, a determination of qualification for religious tax exemptions, a "hybrid" constitutional claim under *Smith*, or a host of other legal proceedings under the federal Religion Clauses, state constitutional religious guarantees, and various statutes and regulations referring to religion or religious practices. Nor does the requirement in RFRA, that government refrain from unjustifiably burdening religion, create excessive entanglement. *See Walz*, 397 U.S. at 674-75 (law lifting burden on religion reduces "the direct confrontations and conflicts that follow" from imposition of the burden and does not create "continuing" involvement between church and state "calling for official and continuing surveillance leading to an impermissible degree of entanglement").

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governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish") (footnotes omitted).

Petitioner paints a nightmarish picture of a paralyzed government unable to take any action without extensive research into the implications of each proposed law on all religious practices. Pet. Br. at 48. But RFRA does not facially invalidate laws just because they do not accommodate "every potential religious objection to every ordinance," Pet. Br. at 48. Rather, RFRA only equips the believer with a claim or defense against application of a law or other government action to the believer. RFRA, 42 U.S.C. § 2000bb-1(b). Further, RFRA only applies if the burden is "substantial," *id.* Hence, petitioner's nightmare turns out to be no more than a gripe that government may not, with relative indifference, substantially and unjustifiably burden the religious practice of particular believers. Such a complaint merits little weight.

CONCLUSION

RFRA clearly passes muster under the Establishment Clause of the First Amendment. This Court should affirm the judgment below.

Respectfully submitted this 10th day of January, 1997.

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